SUPREME COURT, U.S.
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No. 00-1629

In The

Supreme Court Of The United States

JUNO MARINE AGENCY, INC., a Florida corporation, NAVIERA TURRIALBA/INVERSIONES JUNO, S.A., and GARDA MARINE, INC.,

Petitioners,

vs.

TRACEY TAIBL, Special Personal Representative of the ESTATE OF STACEY NORMAN TAIBL, for the use and benefit of TRACEY TAIBL, minor daughter, and the Estate of Stacey Norman Taibl, deceased,

Respondent.

On Petition For A Writ Of Certiorari To The Third District Court of Appeal, State of Florida

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE[1/]

Facts Underlying the Case

The petition for a writ of certiorari arises from a Florida state court judgment obtained by Respondent, Tracey Taibl, against the Petitioners. On October 4, 1988, her father, Stacey Norman Taibl, died from carbon monoxide poisoning aboard the Petitioners' vessel, the M/V Turrialba, a cargo freighter docked at the Port of Miami in Florida's territorial waters. (T. 636, 1492: R. 1837). He died a hero–a Good Samaritan rescuer attempting to aid a seaman trapped in a 30 foot deep ballast tank on the Turrialba. (T. 590, 536-37; R. 1702-03, 1725).

The disaster was set in motion by the ship's captain, who ordered a gasoline powered pump to be lowered into the unventilated deep tank, allowed it to run and give off carbon monoxide in the closed environment for two days, then ordered two crewmen into the tank to effect some repairs. (App. E 22a-26a). When he saw one of the crewmen suffering from the

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1/ The Plaintiff/Respondent, Tracey Taibl, Special Personal Representative of the Estate of Stacey Norman Taibl, for the Use and Benefit of Tracey Taibl, minor daughter, and the Estate of Stacey Norman Taibl, deceased, is referred to as Taibl. Her deceased father, Stacey Norman Taibl, will be referred to as Mr. Taibl. The Defendants/Petitioners Juno Marine Agency, Inc., Naviera Turrialba/Inversiones Juno, S.A., and Garda Marine, Inc, are referred to as the Petitioners or by name.

"App." refers to the appendix included with the Petition for a Writ of Certiorari. "R." refers to the record on appeal in the District Court of Appeal, Third District of Florida. "T." refers to the separately numbered trial transcript. "SR." refers to the supplemental record submitted with the Defendants' brief in the Third District Court of Appeal. "S." refers to the supplemental record filed with Taibl's brief in the Third District Court of Appeal. Emphasis is supplied by counsel unless otherwise noted.

effects of the deadly gas, he realized he had a toxic emergency on his hands, but deliberately failed to tell the Coast Guard that carbon monoxide was involved when calling them for help. (App. E 27a, 37a). Nor did he disclose the nature of the emergency to his crew or post them to warn the rescuers of the toxic atmosphere below. (App. E 27a-28a, 20a, 27a, 43a). Instead, he stood silent on the bridge, allowing each to enter the deathtrap in the deep tank below. (R. 32a).

Mr. Taibl was employed by Oceanic Stevedoring Company as a stevedore superintendent at the port. (T. 515-16). Roy Geer, his friend and co-worker, had just stepped outside the office on his way to lunch when he was waved over to the nearby Turrialba by a crewmember who said there was a man down in the hole. (T. 523-24, 545-46). Geer and Mr. Taibl then walked over to the crew member, who indicated that an accident had occurred on the weather deck. (T. 524-29). Mr. Taibl and Geer then went aboard as Good Samaritans to offer assistance. (T. 525). While on board, Mr. Taibl heroically entered the deep tank to rescue a trapped, unconscious crewmember, Atanacio Fajardo, without any warning from the ship's captain or officers that a gasoline pump had been running in the tank for over two days without ventilation and that, as a result, the tank was filled with carbon monoxide, an odorless, colorless, and poisonous gas. (T. 448, 769, 590, 967-68, 1103; R. 1795). A complete description of the atrocious events surrounding the Turrialba disaster may be found in the district court's order denying limitation of liability. *See In re Garda Marine, Inc.*, 1992 WL 321213 (S.D. Fla. 1992) (App. E).

The reckless misconduct by the captain and other officers ultimately led to the death of three people–Mr. Taibl, Fajardo, the crewmember he bravely tried to save, and Thomas

Leis, a police sergeant involved in the rescue who later suffered a fatal cardiac arrest as a complication of his carbon monoxide poisoning–and caused serious injury to numerous others, including other crew members and shore-side civilian and professional rescuers. (T. 272, 327, 456, 802, 466, 636-37).

Procedural History

This case followed a prolonged ten year path to trial in state court. It was filed in the Florida circuit court in October, 1988. (R. 2-13). Naviera Turrialba and Garda Marine then filed a Petition for Exoneration and Limitation of Liability in the United States District Court for the Southern District of Florida that December, obtaining an immediate stay of the state court action. (SR. 1-15). Taibl filed an answer and a claim for damages, including punitive damages, under general maritime law and Florida's Wrongful Death Act. (SR. 16-39).

Following the trial on exoneration and limitation in April 1992, the district court issued a final order which contained detailed factual findings and which set forth the numerous negligent acts on the part of the ship's captain and officers which caused the tragedy resulting in the injuries and deaths alleged, including Mr. Taibl's. (App. E). As the district court found that they had privity and knowledge of these matters, Garda Marine and Naviera Turrialba were denied exoneration from or limitation of liability. (SR. 140-65).

Garda Marine and Naviera Turrialba then appealed to the U.S. Court of Appeals for the Eleventh Circuit. On appeal, they challenged the court's denial of limitation of liability. They also claimed Taibl was not entitled to a warranty of seaworthiness (which the district court had awarded him under *Grigsby v. Coastal Marine Svc. of Texas, Inc.*, 412 F.2d 1011

(5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970) as a Good Samaritan rescuer) because they alleged Mr. Taibl was covered by the Longshore and Harbor Workers Compensation Act. (S. 46). The Eleventh Circuit affirmed without opinion. *In Re Garda Marine, Inc.*, 9 F.3d 1558 (11th Cir. 1993) (Table)(App.G).

Back in the district court, Naviera Turrialba and Garda Marine then filed a motion for summary judgment on the punitive damages claim. (SR. 166-170). The federal court denied the motion, dismissed the federal action, and lifted the stay of the state court action, allowing Taibl to proceed in her original chosen forum. (S. 245-48). Naviera Turrialba and Garda Marine appealed again, this time challenging the district court's denial of summary judgment on punitive damages. (S. 141-92). The Eleventh Circuit again affirmed the trial court. (SR. 179-181). *Garda Marine, Inc. v. Fajardo*, 78 F.3d 599 (11th Cir. 1996)(Table)(App. F).

This case then proceeded again in state court. A two week trial was held on the remaining issues of compensatory damages, comparative negligence and punitive damages in early 1998. On March 6, 1998, the jury returned a verdict in favor of Taibl. It awarded $1,000,000 for Mr. Taibl's pre-death pain and suffering, $1,050,000 to Tracey Taibl, his surviving daughter, for her wrongful death damages, and $3,500,000 in punitive damages for the Petitioners' reckless misconduct causing his death. (T. 1605-06; 1666). The Petitioners filed motions for a new trial, remittitur and renewed motions for a directed verdict. (R. 2347-59). The trial court denied their motions *in toto* and entered a judgment against them. (R. 2606-07).

The Petitioners appealed to Florida's Third District

Court of Appeal. (R. 2735-51). That court affirmed the judgment entered against the Petitioners, finding "no merit in any of the points" they presented. *Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373, 374 (Fla. 3d DCA 2000)(App. A). It concisely wrote:

> The trial court correctly determined that, because Taibl died on Florida territorial waters in an accident covered neither by the Jones Act, the Longshore and Harbor Workers Compensation Act, nor the Death on the High Seas Act, his survivors were entitled to supplement their maritime remedies with those available for wrongful death under Florida law, including a claim for punitive damages.

(A. 1a). The Supreme Court of Florida denied review of the Third District's decision on January 22, 2001, and the Petitioners thereafter filed their Petition for a Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

This case presents none of the reasoned bases upon which certiorari is traditionally granted by this Court. Quite simply, the case involves the unique circumstance of a heroic rescuer (who happened to be employed as a stevedore) who left his office during his lunch break to courageously answer a call for help on a nearby ship and the straightforward application of federal statutory and admiralty common law to the claims of his estate and survivors. It is a case of a relatively unique factual scenario and, as a result, is a poor vehicle to contribute to this Court's admiralty jurisprudence.

In an attempt to gain certiorari review in this case, Petitioners have mischaracterized Mr. Taibl's status. Laid bare, the Petition argues that which the Petitioners *admitted was false* in their briefs before the United States Court of Appeals last decade: that at the time of the heroic attempted rescue Mr. Taibl was a Jones Act seaman and that he was acting as a longshoreman covered by Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"). Based upon their positions in the federal court proceedings, Petitioners are estopped from arguing the foregoing, but nonetheless make these mischaracterizations in an attempt to fit this case within the scope of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which held that nonpecuniary general maritime law damages are unavailable to Jones Act seamen. *Miles* reasoned that courts should defer to statutory enactments when that legislation creates a comprehensive scheme for recovery of damages, such as the Jones Act or the LHWCA. However, because Taibl was killed on territorial waters and was covered by neither the Jones Act nor by the LHWCA, he was a nonseafarer under *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) and his estate and survivors were thus entitled to supplement their general maritime claims with state law remedies. These include both nonpecuniary damages for his surviving daughter and punitive damages for the willful, wanton, reckless misconduct and entire want of care of the Petitioners in causing his death.

The Petitioners phrase the second issue as whether punitive damages, otherwise allowed by state law, are recoverable in an action involving a *Yamaha* nonseaman. In fact, Petitioners' argument is that punitive damages are unavailable to Jones Act seamen under *Miles*. That is not the issue posed by the facts of this case, however, since Mr. Taibl *was not a Jones Act seaman* at the time of his death. There is

simply nothing about this case that requires this Court's scarce judicial attention.

ARGUMENT

WHY CERTIORARI SHOULD BE DENIED

This proceeding represents the fifth appeal on the merits in a case that has endured two trials over nearly thirteen years. The Petitioners have lost at each step of the way, yet persist in their insistence that every court to reject their arguments got it wrong. The judgment was correctly affirmed below and does not even present a close question worthy of continuing debate, let alone certiorari review. The instant Petition is simply an effort "to stall . . . in the knowledge that justice delayed will be justice denied." *Guardians Ass'n v. Civil Svc. Comm'n of the City of New York*, 463 U.S. 582, 627 (1983)(Marshall, J., dissenting).

There are no substantial issues presented for review in this case. The Petition follows a decision by an intermediate state appellate court that found none of the Petitioners' arguments to have any merit and which properly applied this Court's opinion in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), allowing Taibl to supplement her general maritime remedies with Florida wrongful death damages as her father, a nonseafarer, died while attempting a rescue on a ship in Florida territorial waters. The lower court's decision does not present any substantive constitutional or federal issues; does not conflict with any decision of this Court; does not conflict with any decisions of the United States Circuit Courts of Appeals; and does not conflict with any decisions from other state courts of last resort.

Thus, the Petitioners seek to entice this Court to accept review of this case in the only manner possible: by mischaracterizing both the facts and procedural history, in direct contradiction to their prior positions below. The Petitioners claim that the rulings in the federal court action and the damages awarded in the Florida action are contrary to this Court's decisions in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and in *Yamaha*. Their arguments are based on the fiction that Mr. Taibl was either a Jones Act seaman or covered by the LHWCA. As demonstrated below, Mr. Taibl was neither a Jones Act seaman nor covered by the LHWCA. As a result, this case involves a straightforward application of this Court's decisions in *Miles* and *Yamaha* and is in conflict with neither. That straightforward application creates no issues which warrant this Court's attention. Certiorari should be denied.

I. *Miles* and *Yamaha* Need No Synthesis

The Petitioners argue that there exists a category of claimant covered neither by *Miles* nor *Yamaha*: a person entitled to the warranty of seaworthiness who is not covered by a federal statutory remedy. The Petitioners thus argue that this Court should entertain review of this case to fashion a "synthesis of *Miles* and *Yamaha*," which they suggest should be:

> In maritime wrongful death actions, *a claimant's access to the warranty of seaworthiness*, a general maritime species of strict liability, forecloses access to state wrongful death remedies.

Petition for a Writ of Certiorari ("Petition") at 7 (emphasis

added). The Petitioners are trying to create ambiguity where none exists by twisting the focus from whether a claimant is covered by a statutory remedy to whether the claimant is entitled to the warranty of seaworthiness. *Miles* provides that where one is covered by a federal statutory remedy, damages are limited to those available under the statute; *Yamaha* provides that where Congress has fashioned no federal statutory remedy, general maritime damages may be supplemented with state wrongful death damages for deaths occurring within territorial waters. There is no ambiguity between them. As Taibl's father was not covered by a statutory remedy, she was entitled to supplement her claims with Florida law under *Yamaha*. The warranty of seaworthiness afforded her father as a rescuer is irrelevant and creates no ambiguity between the decisions.

The warranty of seaworthiness, simply speaking, is a duty of care imposing strict liability by requiring the shipowner to furnish a seaworthy, or non-defective, vessel. *See, e.g., Mitchell v. Trawler Racer*, 362 U.S. 539 (1960). Initially, this warranty was available only to Jones Act seamen. Subsequently, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), this Court extended the warranty to longshoremen *working aboard* ships. And in 1969, the Fifth Circuit held that a shore-side rescuer is entitled to the warranty of seaworthiness to reward those *nonseamen* who are injured or killed while responding to the highest calling of the sea: acting to save seamen in peril.

> [Grigsby's] impulsive action in the best tradition of the sea gave him this highly preferred status. Since in doing these humane acts, he was doing that which a seaman responding to the call of the sea would have

> done, he was, in a very real sense and in the *Sieracki*-sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness.

Grigsby v. Coastal Marine Svc. of Texas, Inc., 412 F.2d 1011, 1022 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970). The warranty of seaworthiness was thus extended *narrowly* to Good Samaritan rescuers.

In 1972, Congress amended the LHWCA to overrule *Sieracki* on this point, leaving only Jones Act seamen and *Grigsby* rescuers protected by the warranty of seaworthiness. As acknowledged in the Petition at 4, a mere "guest" aboard a vessel cannot obtain the warranty of seaworthiness. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959). Thus, the only maritime creature entitled to the warranty which is not covered by the Jones Act is a *Grigsby* life salvor.

Under *Miles*, a Jones Act seaman is limited to *Jones Act damages*, and may not supplement them with *general maritime remedies*. Under *Yamaha*, a nonseafarer who is injured or killed in state territorial waters may supplement *general maritime remedies* with *state law remedies*. In effect, the Petitioners wish this Court to turn *Grigsby* on its head by revising its holding to be not that shoreside rescuers obtain the *duty of care* required by the warranty of seaworthiness in recognition of their valor, but that instead they are *limited to Jones Act remedies*, though they have no right of recovery under the Jones Act. The "synthesis" they seek from this Court in this case would result in *Miles* being triggered to exclude general maritime remedies and *Yamaha* being inapplicable

because Taibl is a "*Grigsby* seafarer," thus excluding state law remedies. Because the Petitioners were not Mr. Taibl's employers, his estate and survivors also have no right of recovery from them under the Jones Act[2/] or the LHWCA.[3/] The logical conclusion of the Petitioners' "synthesis," as revealed, would be that Taibl is denied *any recovery* of *any kind* for her father's heroic actions and his tragic, unnecessary death.

Of course, even if the "synthesis" made sense, the Petitioners can only justify their plea to this Court to grant certiorari and to adopt it by demonstrating a broad ranging need. *Yet they fail to even attempt such a demonstration.* The reason is clear: of those two groups entitled to the warranty of seaworthiness, 1) Jones Act seamen are already denied state wrongful death remedies under *Miles*; and 2) *Grigsby* rescuers are likely few and far between. In short, there can be no need to clarify the law in a field where there is a paucity of existing

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2/ *See, e.g., Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1498 (9th Cir. 1995) ("[t]o recover under the Jones Act, plaintiff must show the defendant was his employer at the time of the injury"); *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 170 (2d Cir. 1973) (same); *Price v. SS Yaracuy*, 378 F.2d 156, 160 n. 11 (5th Cir. 1967)("[t]he Jones Act is unavailable to a longshoreman in a suit against the shipowner, who is not his employer").

3/ The LHWCA provides benefits for "death." 33 U.S.C. § 903(a). Under the Act, "death" must result from "injury." 33 U.S.C. § 902(10). "Injury" is limited to "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Here, Taibl's death did not arise out of and in the course of his employment as a longshoreman. He was not performing any longshoring work at the time. He just happened to be in Oceanic's office when he responded to the rescue call.

and potential cases involving such a unique fact pattern.[4/]

A. Taibl's Attainment of the Warranty of Seaworthiness Was Irrelevant to the Petitioners' Liability and Her Recovery

The true ethereal nature of the Petition does not end with the foregoing analysis, for Taibl's recovery under the warranty of seaworthiness was and is irrelevant to the Petitioners' liability. District Judge Mishler, following the limitation of liability trial in 1992, found the Petitioners to be liable based upon *both* negligence and unseaworthiness.[5/] Furthermore, the Florida state court jury found the Petitioners to have been guilty of conduct sufficient to warrant the imposition of punitive damages against them (for which their strict compensatory liability for the unseaworthiness of the Turrialba was irrelevant). Under Florida law, the jury was instructed, punitive damages may be assessed only if the Petitioners' conduct leading to Mr. Taibl's death "showed a

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[4/] Indeed, our research has failed to reveal (and the Petitioners have failed to cite) any reported decisions applying *Grigsby* to afford the warranty of seaworthiness to rescuers, let alone a critical mass of divergent cases sufficient to justify action by this Court to clarify its application in the *Yamaha* context. The absence of this issue percolating in the admiralty court system would seem to confirm that there is an absence of dispute below as to how *Grigsby* applies when the heroic shoreside rescuer fact pattern does arise.

[5/] "[P]etitioners concede that . . . Taibl was owed a duty of reasonable care under the circumstances. Petitioner[s] breached this duty by failing to warn Taibl of the hazardous conditions in the tank.... [S]uch negligence was a legal cause of the death[] of . . . Taibl.... The dangerous condition . . . rendered the vessel unseaworthy." *In re Garda Marine, Inc.*, 1992 WL 321213, *10 (S.D. Fla. 1992) (citations omitted)(App. E at 43a).

reckless disregard of human life," "an entire lack of care" or a "reckless indifference to the rights of others." Florida Standard Jury Instruction PD1(a)(2)[6] (T. 1593). The Third District Court of Appeal upheld the verdict, stating "[t]he facts fully sustain the jury verdict awarding punitive damages in this particular case." *Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373, 375 (Fla. 3d DCA 2001)(citations omitted)(App. A 3a). Thus, the strict liability *without fault* imposed upon the Petitioners by the warranty of seaworthiness under *Grigsby* was irrelevant to their liability and of no moment to Taibl's ability to recover against them, as they were found to be *at fault* not only under the negligence standard, but also under the higher punitive damages standard.

The Petitioners would nonetheless induce the Court to hold that where a heroic rescuer is entitled to recovery under the higher duty of care *Grigsby* makes available, his broader state law remedies otherwise available for a simple *Kermarec* negligence claim are sacrificed in homage to *Miles* and irrespective of *Yamaha*. Rather than reward Mr. Taibl for his valiant actions as the Fifth Circuit intended, the Petitioners would have this Court punish his estate and survivors by using *Grigsby* to take away their state law remedies for his injury and death.[7] Most respectfully, "[t]hat is not and cannot be the law."

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[6] This standard comports with federal admiralty law for the imposition of punitive damages. *See, e.g., In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421, 1427-28 (11th Cir.1997), *cert. denied sub nom. Altosino v. Warrior & Gulf Nav. Co.*, 522 U.S. 1110 (1998).

[7] In fact, Grigsby's survivors were allowed to recover Louisiana state law remedies, including nonpecuniary damages for loss of "parental guidance and care . . . of love and affection," *Grigsby*, 412 F.2d at 1042, against the defendants (even while obtaining the warranty of

(continued...)

McKoy v. North Carolina, 494 U.S. 433, 446 (1990) (Blackmun, J., concurring).[8]

B. Taibl Was a Nonseafarer Entitled to Supplement General Maritime Remedies with State Law Damages Under *Yamaha*

According to the Petitioners, *Miles* limits the recovery of nonpecuniary damages, including punitive damages, in this case. In *Miles*, this Court held that a Jones Act seaman could not circumvent the Jones Act, which does not allow nonpecuniary damages in wrongful death cases, by bringing a claim for such damages under general maritime law. This Court's analysis is clear—when Congress has limited the damages recoverable in a particular situation by statute, courts are not free to allow additional damages through the guise of a maritime common law action. 498 U.S. at 31. *See also Dooley*

7/ (...continued)
seaworthiness), which reflects the understanding that state law remedies could supplement general maritime claims in territorial waters and foreshadowed this Court's decision in *Yamaha*.

8/ On the other hand, the Petitioners argue that because *Grigsby* relies upon *Sieracki* (which was overruled by the 1972 amendments to the LHWCA), *Grigsby* is no longer good law. Petition at 12 n. 5. Assuming *arguendo* this to be true, the Petitioners' argument defeats itself. If *Grigsby* was overruled with *Sieracki* (assuming this could even be argued at this point—*see infra* n.16), any district court error in following it was harmless as the Petitioners were guilty of negligence and reckless misconduct justifying the damages awarded regardless of the strict liability of unseaworthiness. Completing the analysis, assuming the correctness of the Petitioners' flawed argument that *Miles* limits the remedies available to those entitled to the warranty of seaworthiness, if *Grigsby* is bad law, Taibl has no seaworthiness claim to be limited by *Miles* and her negligence and reckless misconduct judgment stands under *Yamaha*.

v. Korean Air Lines Co., Ltd., 524 U.S. 116 (1998)(general maritime law damages not recoverable for deaths on the high seas as Congress has limited recoverable damages under the Death on the High Seas Act ("DOHSA")).

Taibl's wrongful death claim was not covered by DOHSA since her father's death did not occur on the high seas. Her wrongful death claim was not covered by the Jones Act either and, in any event, she had no Jones Act claim against the Petitioners because they were not her father's employer. Although the federal court accorded Mr. Taibl the status of a vicarious "*Grigsby*" seaman for the limited purpose of awarding him the warranty of seaworthiness, this did not make him a Jones Act seaman or entitle his estate to pursue a Jones Act claim. Nor was Mr. Taibl covered by the LHWCA, since his death did not arise out of the course and scope of his employment as a longshoreman. *Miles* does not apply.[9/]

Miles' limited reach was made clear by this Court's subsequent decision in *Yamaha*, which held that the survivors of a nonseafarer who is killed in territorial waters are entitled to supplement their general maritime claim with state law damages. This Court defined a "nonseafarer" as someone not covered by the Jones Act or the LHWCA.[10/] Here, Mr. Taibl

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9/ Numerous courts have recognized that when a maritime claim is outside the scope of the Jones Act or DOHSA, *Miles* is inapplicable. *See, e.g., CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 702 (1st Cir. 1995); *In re Morehead Marine*, 844 F.Supp. 1193, 1197 (S.D. Ohio 1994); *In the Matter of Denet Towing Service, Inc.*, 1999 WL 329698 (E.D.La. 1999); *Powers v. Bayliner Marine Corp.*, 855 F.Supp. 199 (W.D.Mich. 1994)(same).

10/ "By 'nonseafarers' we mean persons who are neither seamen covered by the Jones Act, 46 U.S.C. App. § 688 (1988 ed.), nor the (continued...)

was a nonseafarer, *i.e.*, someone not covered by the Jones Act or the LHWCA. Under *Yamaha*, his estate and survivors were entitled to the benefit of Florida's wrongful death remedies. *Yamaha*, 516 U.S. at 215.

Miles and *Yamaha*, read together, provide a clear guide for determining when state court remedies supplement general maritime law on claims for wrongful death. When the victim is covered by the Jones Act, DOHSA or the LHWCA, the remedies established by Congress are exclusive; a court may not defeat congressional intent by supplementing those remedies with state or general maritime law. But when the claim is *not* covered by these acts, those concerns disappear; Miles does not apply and, under *Yamaha*, the plaintiff may supplement his general maritime common law recovery with state law remedies.

Here, Taibl was entitled to do precisely that. Mr. Taibl was not acting as a Jones Act seaman or longshoreman at the time of his death. He was merely a passerby who, acting as a Good Samaritan, sought to rescue those in need. Because he was a nonseafarer (*i.e.*, someone whose claim is not covered by the Jones Act or the LHWCA) who was killed in Florida territorial waters, the trial court properly held that his beneficiaries were entitled to supplement their remedies with those available under Florida's wrongful death act, including punitive damages.

10/ (...continued)
longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*" *Yamaha*, 516 U.S. at 205 n.2.

1. *Miles* Does Not Apply as Taibl Was Not Covered by the Jones Act

The Petitioners argue that Mr. Taibl was a Jones Act seaman and that the claims of his estate and survivors are thus limited under *Miles*. *See* Petition at 12-13, 15. Incredibly, before the Eleventh Circuit they *admitted* on two occasions that Mr. Taibl could not be a Jones Act seaman. In their brief, they told the Eleventh Circuit:

> Petitioners believe that the district court's reference[11/] to claimant Taibl as a "Jones Act" seaman is a clerical error. ***Under no stretch of the imagination*** could Taibl be considered a Jones Act seaman, for he *was not employed* by Petitioners. Petitioners respectfully suggest that the district court must have meant to call Taibl a "*Sieracki*" seaman or "putative" seaman.

(S. 46).[12/]

11/ The issue came about due to a typographical error in the district court's order denying limitation of liability, and was as follows: "In a decision dated February 3, 1992, we held that claimant Taibl *was a seaman under the Jones Act* and thus entitled to a warranty of seaworthiness." *In re Garda Marine, Inc.*, 1992 WL 321213, *10 (S.D. Fla. April 23, 1992) (App. E)(emphasis added). This mistake of word choice is revealed by the February 3, 1992 order referenced therein: "We find that, under *Grigsby*, Taibl had the status vicariously as a seaman and is, therefore, entitled to the warranty of seaworthiness." *In re Garda Marine, Inc.*, 1992 WL 315963, *2 (S.D. Fla. Feb. 3, 1992)(App. D). Everyone agreed that the district court meant Taibl obtained the seaworthiness warranty under *Grigsby*, not the Jones Act. *See infra* n.12.

12/ Garda Marine and Naviera Turrialba made the same (continued...)

Under both federal and Florida law, the Petitioners are estopped from taking a contrary position here and now arguing that Taibl was a Jones Act seaman. "Judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a *mockery of justice* by inconsistent pleadings." *American Nat. Bank of Jacksonville v. Federal Dep. Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983) (emphasis added) (citation omitted). *Montero v. Compugraphic Corp.*, 531 So.2d 1034, 1036 (Fla. 3d DCA 1988)("[a] litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions"). Although the Petitioners may now be able to stretch their imaginations, they should not be permitted to obtain review by stretching the truth from below.[13/]

Very simply, where, as here, the injured or deceased person is not a Jones Act seaman entitled to pursue a Jones Act claim against the defendant, *Miles* is inapplicable because there is no federal statutory remedy which can be deemed exclusive. The federal court accorded Mr. Taibl "seaman" status as a *Grigsby* life salvor only for the purpose of holding that he was

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12/ (...continued)
acknowledgment in their second appeal to the Eleventh Circuit. Initial Brief of the Petitioners in *Garda Marine, Inc. v. Fajardo*, case. no. 94-4907 (11th Cir. Dec. 27, 1994), at 24-25 ("Petitioners believe that the district court's reference to Claimant Taibl as a Jones Act seaman is an inadvertent error.... As such, Taibl falls outside the ambit of DOHSA and the Jones Act"). (S. 181-82). Taibl agreed in both appeals that the "Jones Act" reference was a typographical mistake. (S. 120-22, 227-28).

13/ Moreover, as recognized in *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376 (5th Cir. 1987) the issue of Jones Act seaman status is usually a question of fact. *Id.* at 389. Petitioners did not introduce evidence at trial showing that Mr. Taibl was a Jones Act seaman or ask that the issue be submitted to the jury.

owed the warranty of seaworthiness. His status as a vicarious seaman for this limited purpose did not make him a Jones Act seaman or give him a Jones Act claim against the Petitioners. Therefore *Miles* has no bearing on this case. The estate of Mr. Taibl, a nonseafarer, was entitled to pursue general maritime wrongful death remedies and to supplement those remedies, pursuant to *Yamaha*, with remedies available under Florida's wrongful death act.

2. Taibl Was Not Acting as a Longshoreman at the Time of His Death

The Petitioners only lightly press Mr. Taibl's profession as a longshoreman in their Petition,[14/] chiefly relying upon the smokescreen that *Grigsby* rescuer *status gives rise* to Jones Act remedy limitations under *Miles*. Nonetheless, because it is addressed there, it is fully rebutted here.

In the district court during the limitation of liability proceeding, the Petitioners argued that Mr. Taibl's status as a longshoreman barred his unseaworthiness claim. The court initially agreed. It held that Mr. Taibl's status as a

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14/ For example, the Petitioners mention in their statement of facts that Mr. Taibl's estate allegedly received some benefits under the LHWCA. For good reason, Petitioners make no argument that this is relevant to the issue before this Court. First, Petitioners introduced no evidence at trial concerning those benefits, *i.e.*, the nature of any LHWCA claim made or the nature of the benefits paid. More importantly, this Court has held that the receipt of LHWCA benefits is inadmissible to prove that the recipient is covered by the LHWCA Act. "[I]t is reversible error to permit [a defendant] to prove that a worker accepted LHWCA benefits while awaiting trial.... This is so, quite obviously, because the question of coverage has never actually been litigated." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991).

longshoreman under the LHWCA precluded his claim for unseaworthiness pursuant to 33 U.S.C. § 905(b).[15/] (SR. 100-105). Taibl then moved for relief because the record proved he was not acting as a longshoreman at the time of his death. (SR. 132-33). Following the trial on exoneration and limitation, the federal court *granted* Taibl's motion, finding:

> Having had the benefit of the testimony at trial, we can safely say that Taibl was not performing or supervising any stevedoring activities at the time in question. He came aboard solely in response to a call for help.

(SR. 138).

Indeed during the federal limitation trial, the Petitioners *conceded* that Mr. Taibl was not working in the course and scope of his employment as a longshoreman when he responded to the rescue: "He was not working aboard the vessel. He had no duties aboard the vessel. He happened to be an employee of our stevedore, who was not working on the vessel." (S. 5-6). As a result, Mr. Taibl was not covered by the LHWCA.

The Petitioners then filed their first appeal to the Eleventh Circuit. They argued that Mr. Taibl's status as a longshoreman precluded his claim for unseaworthiness. Their position was straightforward: "Thus, as the Supreme Court makes clear in *Miles*, longshoremen covered by the LHWCA

[15/] 33 U.S.C. § 905(b) provides that a person "covered under this chapter," *i.e.*, covered under the LHWCA, who is injured or killed may bring an action against a vessel for negligence but is barred from bringing an action against a vessel for unseaworthiness.

may no longer be considered *Sieracki* seaman." (S. 62). Taibl responded that the federal court's finding that Mr. Taibl was not working as a longshoreman at the time of his death was supported by the evidence. The Petitioners lost. Having unsuccessfully litigated the issue of whether Mr. Taibl was covered by the LHWCA through a completed federal appeal and having unsuccessfully raised it again below, Petitioners have evidently wisely abandoned that contention here.[16/] Thus it stands uncontested that Mr. Taibl "was not performing or supervising any stevedoring activities at the time in question. He came aboard solely in response to a call for help." (SR. 138).

Contrary to the Petitioners' suggestion, it is not enough that Mr. Taibl made his living as a longshoreman. As *Yamaha* makes plain, Mr. Taibl is a "nonseafarer," entitled to pursue state law remedies unless he is "covered" by the LHWCA (or the Jones Act). 516 U.S. at 205. Here, Mr. Taibl's death was

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16/ To the extent they may suggest they have not abandoned it, it is barred by the law of the case as it was argued in the limitation of liability proceeding in 1992 and was the subject of the first appeal to the Eleventh Circuit. *See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n,*, 117 F.3d 1328, 1336 (11th Cir. 1997). The Petitioners did not seek certiorari from this Court thereafter. As the 90 day period to seek such review has long since passed, 28 U.S.C. § 2101(c), the Eleventh Circuit's undisturbed affirmance of the district court's finding that Mr. Taibl was not acting as a longshoreman at the time of his death is *res judicata* on the issue and may not be reargued again here in subsequent proceedings. *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). *See Guillot v. Cenac Towing Co.*, 366 F.2d 898, 909 (5th Cir. 1966)("fact and legal conclusions [in limitation of liability action] . . . become res judicata . . . [in the state court] proceedings").

not "covered" by the LHWCA.[17/] The LHWCA provides benefits for "death." 33 U.S.C. § 903(a). Under the Act, "death" must result from "injury." 33 U.S.C. § 902(10). "Injury" is limited to "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Here, Mr. Taibl's death did not arise out of and in the course of his employment as a longshoreman. As the district court conclusively found, he was not performing any longshoring work at the time.[18/]

The Petitioners do *not* claim that Mr. Taibl was engaged in longshoring activities at the time of his death. They do not claim that Mr. Taibl's death arose out of and in the course of his employment as a longshoreman. Instead, the Petitioners claim that Mr. Taibl could never be a nonseafarer as defined by *Yamaha* because of his employment as a longshore worker.

17/ *See supra n. 3.*

18/ The Petitioners' reliance on *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1996), *cert. denied*, 522 U.S. 1107 (1998), and *In the Matter of Goose Creek Trawlers, Inc.*, 972 F.Supp. 946 (E.D.N.C. 1997), is misplaced. Ghotra was an employee of a vessel; the Court specifically noted that Ghotra "satisfied the status and situs test for coverage under the LHWCA; he was killed on a vessel in navigable waters while engaged in traditional maritime employment." 113 F.3d at 1059. He therefore had a LHWCA claim against the vessel pursuant to 33 U.S.C. 905(b). In *Goose Creek*, the decedent was a self-employed fisherman. He, like Ghotra, was a maritime worker doing traditional maritime work at the time of his death. Here, Mr. Taibl's death did not arise out of the course and scope of traditional maritime employment; he was a mere passerby who responded to a rescue. Moreover, the parties litigated the applicability of § 905(b) in federal court. The district court determined that it did not apply because Mr. Taibl was not acting in the course and scope of his employment when he was killed. The Petitioners do not challenge that conclusive finding here. *See supra* note 16.

Thus, the Petitioners argue:

> The initial group of persons identified in *Yamaha* as seafarers includes those whose remedies are governed by a federal statute. However, by use of the conjunctive "and," *Yamaha* created a broad class of seafarers which includes seamen, longshore workers, or persons otherwise engaged in maritime trade. By referring first to those covered by federal statute and then to this latter group of individuals, this Court obviously intended to include as "seafarers" those identified classes of individuals *even when they were not "covered" under a federal maritime statute*.

Petition at 11.

The Petitioners' reading of *Yamaha* is far from being "obvious." In fact, it is wholly inconsistent with this Court's analysis and holdings in *Miles* and *Yamaha*. Under the Petitioners' interpretation, if Mr. Taibl was killed while using a jet ski on his vacation, under the same circumstances leading to the death of young Natalie Calhoun in *Yamaha*, his estate would not have a claim under Florida's wrongful death act because he worked as a longshoreman–even though he was not engaged in that work at the time of his death. This result is not only at odds with common sense, but is also clearly at odds with both *Miles* and *Yamaha*. In both those cases, the driving factor was that Congress had created remedies for persons injured in certain situations, *i.e.*, while working as a Jones Act seaman, or while working as longshore worker, or while on the high seas. This Court was concerned about infringing on a comprehensive scheme of tort recovery and damages which had

been enacted by Congress. Here, there is no such concern. Mr. Taibl was not covered by the LHWCA. The application of *Yamaha* does not infringe upon any federal statutory schemes.

Yamaha's holding does not depend on something as ephemeral as job titles. The controlling factor is whether the deceased victim was covered by the federal statutory scheme under LHWCA. That occurs only if the victim was acting within the course and scope of his employment.

In sum, under *Yamaha*, Mr. Taibl was a nonseafarer because he was not covered by the Jones Act, the LHWCA, or DOHSA. Taibl was entitled to supplement the general maritime claim with Florida's wrongful death remedies and claim all damages available under the Florida wrongful death act. *See American Dredging Co. v. Lambert*, 81 F.3d 127 (11th Cir. 1996)(in a maritime wrongful death case not otherwise governed by Jones Act, DOHSA, or LHWCA, Florida wrongful death remedies may supplement federal maritime claim); *Florida Power & Light Co. v. Polackwich*, 677 So.2d 880, 882 (Fla. 2d DCA 1996) (same). Damages recoverable under Florida law for wrongful death include the pain and suffering of a decedent's survivors, Fla. Stat. § 768.21, and punitive damages, *Martin v. United Security Svcs., Inc.*, 314 So.2d 765 (1975), which are likewise available under general maritime law. *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), *cert. denied sub nom. Altosino v. Warrior & Gulf Nav. Co.*, 522 U.S. 1110 (1998). Those damages were properly awarded. *Miles* and *Yamaha* fully support the result reached here and supply no basis for certiorari review of this case.

II. Punitive Damages Can Be Assessed for the Death of a Nonseafarer in Territorial Waters

In *Yamaha*, this Court held that state wrongful death remedies supplement general maritime law and furnish the measure of damages for the death of a nonseafarer in territorial waters. 516 U.S. at 202, 215-16. Thus, in a wrongful death action involving a nonseafarer, *Yamaha* allows punitive damages, if authorized by state law. Indeed, the Third Circuit's decision in *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 624, 625 (3d Cir. 1994), affirmed by this Court in *Yamaha*, 516 U.S. 199 (1996), specifically allowed the plaintiff to supplement his maritime claim with state law non-pecuniary damage claims, including punitive damages. *See In re Amtrak "Sunset Limited"*, 121 F.3d at 1427-28 (wrongful death claimant who is entitled to supplement maritime remedies with state law remedies under *Yamaha* is entitled to seek punitive damages pursuant to state law, so long as the state standard for the award of punitive damages is not less stringent than the standard for the award of punitive damages under maritime law). The Petitioners make no argument to the contrary.

Interestingly, the issue on which the Petitioners claim to seek review is whether the ban on non-pecuniary damages for Jones Act seamen announced in *Miles*, 498 U.S. 19 (1990), applies to a nonseafarer as defined in *Yamaha*, who is entitled to punitive damages by state wrongful death law. In fact, the Petitioners' actual argument is premised on the claim that Mr. Taibl *was* a Jones Act seaman under *Miles* rather than a nonseafarer under *Yamaha*. Thus, the "issue presented" bears little relationship to the argument the Petitioners actually make in their Petition.

According to the Petitioners, Taibl is not entitled to recover punitive damages because Mr. Taibl was a seaman and, under "the overwhelming weight of authority," punitive damages are not recoverable in an action involving the death of a seaman. Petition at 16. However, the Petitioners fail to cite a single case that applies that principle to the death of a nonseafarer in territorial waters, much less a case with that holding in the post-*Yamaha* era. All of the cases cited by the Petitioners involve actions based on the personal injury or death of *a Jones Act seaman*; all pre-date *Yamaha*. Very simply, whether punitive damages are available for the wrongful death of a nonseafarer, if permissible under state law, is not an issue which invites this Court's attention. It has not been extensively discussed in other courts. There is no split among the circuits or with decisions in state courts. *Miles* addresses neither punitive damages nor deaths by nonseafarers. *Yamaha* did both. It does not permit any conclusion other than the one reached here: in actions for the wrongful death of a nonseaman, punitive damages are recoverable if allowed by state law.

In sum, under *Yamaha*, Taibl was entitled to obtain Florida state law damages, including punitive damages. Tracey Taibl's pain and suffering award and the punitive damage award for the reprehensible manner of her father's unnecessary death should therefore remain undisturbed as properly affirmed below.

CONCLUSION

For the foregoing reasons, Respondent, Tracey Taibl, Special Personal Representative of the Estate of Stacey Norman Taibl, for the use and benefit of Tracey Taibl, minor daughter, and the Estate of Stacey Norman Taibl, deceased, respectfully requests that this Court deny certiorari in this action.

Respectfully submitted,

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